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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1996

In the Matter of)
)
Amendment of Parts 20 and 24 of the) WT Docket No. 96-59
Commission's Rules -- Broadband PCS)
Competitive Bidding and the Commercial)
Mobile Radio Service Spectrum Cap)
)
Amendment of the Commission's Cellular) GN Docket No. 90-314
PCS Cross-Ownership Rule)

To: The Commission

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COMMENTS OF ANTIGONE COMMUNICATIONS LIMITED PARTNERSHIP

Antigone Communications Limited Partnership ("Antigone"), by its attorneys and pursuant to §1.415 of the Commission's Rules, hereby submits its comments respecting the Notice of Proposed Rule Making, (WT Docket No. 96-59, GN Docket No. 90-324) FCC 96-119, released March 20, 1996 in the above-referenced dockets (the "NPRM").

Antigone is a women-owned and controlled small business entity. Antigone was an unsuccessful participant in the Commission's auctions for the C frequency block of the broadband Personal Communications Services ("PCS"), and intends to participate in the upcoming auctions for the PCS D, E, and F blocks. If and to the extent that the Commission is required to re-auction any C block PCS licenses, Antigone intends to participate there as well. Thus, Antigone has a substantial interest in the outcome of this proceeding.

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I. THE COMMISSION SHOULD NOT ELIMINATE GENDER-BASED PROVISIONS FROM ITS RULES

The Commission should maintain gender-based provisions in its rules for the PCS F block, and should extend those provisions to the D and E blocks as well. As noted by the Commission, *NPRM* at ¶18 and n.41, gender-based provisions, unlike race-based provisions, are still subject to an intermediate scrutiny standard of review. The Commission should not try to anticipate future Supreme Court decisions or assume that the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) will be extended to gender-based distinctions. Notably, the Court in *Adarand* concurred that government programs based on *disadvantage* and not on race are subject only to relaxed judicial scrutiny. *Id.* at 2105. Moreover, unless and until the law is changed, the Supreme Court has expressly held that the appropriate standard of review in gender cases is the intermediate standard. *See, NPRM* at n.41. Thus, the Commission would be violating the U.S. Constitution if it applied a strict scrutiny standard. Where, as here, the governing statute expressly orders the Commission to take special steps to insure that PCS licenses are disseminated "among a wide variety of applicants, including...businesses owned by...women; " 47 U.S.C. § 309(j)(3)(B), the Commission has no power to do otherwise.

Without gender-based provisions and preferences, the majority of women-owned/controlled entities will not be able to effectively compete in the D, E and F block auctions, and no PCS licenses will be disseminated to businesses owned by women. The gender-neutral provisions for small business entities adopted by the Commission for the

PCS C block auction failed miserably in producing women-owned/controlled auction winners. For example, Antigone competed in the C block auction against male-owned/controlled small businesses. Although Antigone raised substantial funds from investors acquiring non-voting interests in the company, Antigone was still unable to compete financially against the male-owned/controlled entities participating in the auction.

Also, after the Commission amended its rules for the C block auction to make them gender-neutral, many women-owned/controlled entities became male-controlled. Notably, only 34 of the original 255 qualified C block bidders were women-owned/-controlled. Moreover, hardly any of the remaining bidders in the PCS C block auction as of April 15, 1996, were women-owned/controlled entities. Perforce, additional incentives or advantages for women-owned/controlled entities are required.

II. THE COMMISSION'S GENDER-BASED MEASURES PASS THE INTERMEDIATE SCRUTINY STANDARD OF REVIEW

Under an intermediate scrutiny standard of review, a gender-based provision is constitutional if it serves important governmental objectives and is substantially related to the achievement of those objectives. Additionally, the provision must not impose an impermissible burden on those who do not fall within the gender classification.^{1/} The Commission's gender-based provisions meet this standard of review. Indeed, there is an important governmental objective mandated by Congress in §309(j)(4)(D) of the Act --

^{1/} See, e.g., *Notice of Inquiry on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *NPRM* at ¶18; *Adarand*, 115 S.Ct. at 2118 (comparison of intermediate scrutiny with strict scrutiny).

i.e., to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and *women* are given the opportunity to participate in the provision of spectrum-based services." See 47 U.S.C. §309(j)(4)(D) (emphasis added).

As amply documented by the Commission in Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Fifth Report and Order), (PP Docket No. 93-253) 9 FCC Rcd 5532, 5573 at ¶¶98 and 5574-5575 at ¶¶101-102 (1994) (hereinafter Fifth Report and Order), women and women-owned businesses have historically faced discrimination in the private lending market, making it difficult to raise or secure capital. This discrimination has created a barrier to participation by women in the communications industry, a barrier which few women have been able to break through. *Id.* at 5578 ¶107. Elimination of this barrier is a sufficiently important governmental interest, especially in this day and age when more women desire to enter the work force and have increased entrepreneurial interests.

The Commission's gender-based provisions proposed for the F block are substantially related to the achievement of this goal mandated by Congress. There are no more narrowly tailored alternatives available, nor any that put less of a burden upon men and male-owned/controlled entities. The only possible alternative was the elimination of gender-based provisions and the adoption of the "small business" method used by the Commission with the C block, which method failed to achieve the intended

goal of providing women with a meaningful opportunity to win licenses and provide spectrum-based services.

As noted by the Commission in the Fifth Report and Order, *supra*, at 5572 "...it is necessary to do more to ensure that businesses owned by... women have a *meaningful* opportunity to participate in the provision of personal communications services..." (emphasis added). Nowhere has this been more amply demonstrated than in the C block auction, where the Commission eliminated its gender-based provisions in favor of gender-neutral, small business-based provisions, on the theory that the small business-based provisions would provide the necessary catalyst for participation by women-owned/controlled entities in the auction. This was not the case. Once investors became aware that there was no longer any advantage to backing women and women-owned/controlled entities vis-a-vis backing men and male-owned/controlled entities, many women-owned/controlled entities participating in the C block auction lost their funding and could not even qualify to bid. What began as a largely minority/women block wound up with only 13.33% of the qualified bidders being women-owned/controlled! See NPRM at ¶27. Moreover, the few women-owned/controlled entities participating in the C block auction have not been able to *effectively* compete, as demonstrated by the fact that hardly any of the remaining bidders participating in the auction are women-owned/controlled entities.

Patently, more gender-based incentives are needed, such as giving women-owned/controlled bidders an extra ten percent (10%) discount over other small business

entities. Also, the Commission should help women-owned/controlled entities enter the PCS industry by loosening the C block and F block transfer restrictions of §24.839 of the Commission's Rules to allow assignments or transfers at any time to a women-owned/controlled small business entity.

At the very least, women-owned/controlled entities should be given an advantage in attracting non-voting foreign capital, since the primary disadvantage for women is in attracting capital and such an approach is narrowly tailored to address that problem. For instance, the Commission should allow women-owned/controlled entities to seek and obtain funding from foreign sources by exempting women-owned/controlled entities from the twenty-five percent (25%) foreign ownership threshold adopted in Market Entry and Regulation of Foreign-Affiliated Entities (Report and Order), (IB Docket No. 95-22) FCC 95-475 (released November 30, 1996) ("Foreign Reciprocity Order"). Specifically, where the interest is non-voting (e.g., limited partner units or non-voting stock), the Commission should let a women-owned/controlled entity receive up to 75% of its capital contributions from any foreigners that would have met the tests imposed prior to the Foreign Reciprocity Order.^{2/}

^{2/} For a discussion of the applicable tests, *see, e.g., GRC Cablevision*, 47 FCC 2d 467 (1974). Under § 310(b)(4) of the Communications Act of 1934 as amended ("Act"), an indirect non-controlling foreign ownership interest is permissible unless the Commission specifically finds it inconsistent with the public interest. Thus, there is no statutory barrier to Antigone's proposal.

III. DISCUSSION OF SPECIFIC PROPOSALS IN THE *NPRM*

Of the many proposals put forward by the Commission in the *NPRM*, there are several in particular that Antigone advocates should be adopted, some with minor changes. For instance, the Commission should auction the D, E and F blocks simultaneously and should extend its small business and gender-based provisions across all three blocks. The Commission has successfully conducted at least one auction (the 900 MHz SMR auction) where installment payers and non-installment payers were intermingled. Using what it has learned from that other auction, the Commission should be able to do so again with the PCS D, E and F block auctions without difficulty. Moreover, simultaneously auctioning of the D, E and F blocks is more efficient and will expedite the issuance of the broadband PCS 10 MHz licenses and, thus, the provision of service to the public.

Also, the Commission should extend the C block affiliation rules to the D, E, and F blocks, with minor exceptions. Respecting entities *not* under common control, the Commission should limit its inquiry to whether the entities together own cognizable interests in commercial mobile radio service ("CMRS") properties. The fact that two entities which are not under common control are co-owners of non-CMRS properties is irrelevant. It simply shows how the knowledge of the opportunity traveled, not that the entities act in concert. Thus, for example, if two people own a television station or a plumbing company, their interests should *not* be aggregated just because they both choose to invest in a PCS entity. Eliminating this inquiry also eliminates the need to

report non-CMRS ownership interests, thereby reducing paperwork and the burden on applicants for the D, E, and F blocks.

Additionally, the Commission should extend the C block installment payment provisions to the D, E and F blocks, especially the ten percent down and six-year interest-only payment plan for small businesses. However, the Commission should modify the installment payment plan for small businesses to allow optional partial prepayments in increments of \$100,000.00. The Commission should also extend the C block definitions of "small business" to the D, E and F blocks. These installment payment plans are an effective tool for encouraging small businesses and women-owned/controlled entities to participate in the auctions. The most favorable installment payment plan, in particular, is an effective incentive that can be used by women-owned/controlled entities in obtaining financing.

The terms of the installment payment plans should not be altered to reflect anticipated lower values of the 10 MHz licenses in the D, E and F blocks. While the amounts bid for the 10 MHz licenses may be lower than the amounts bid for the 30 MHz licenses, in all probability the values of the 10 MHz licenses will still be significantly high, given the very large amounts being bid for the 30 MHz licenses. Moreover, the D, E and F block auctions provide the last means by which many of the unsuccessful bidders in the C block auction might be able to participate in broadband PCS, thus increasing the value of the 10 MHz licenses.

The Commission should also extend its current C block transfer restrictions to the D, E and F blocks, but with one minor adjustment. No licensee in the D, E or F block

(assuming the blocks are auctioned simultaneously) qualifying as a small business should be permitted to voluntarily assign or transfer control of its license during the three years after the date of the license, *except* to women-owned/controlled small business entities.

Antigone agrees with the Commission's observation that there is no need for PCS D, E and F block applicants to disclose ownership of non-CMRS or non-private mobile radio service ("PMRS") businesses owned by individuals or by non-attributable investors. Applicants should have to disclose only those non-CMRS or non-PMRS business interests owned by the applicant itself or by its controlling parent, if applicable. Disclosing non-CMRS or non-PMRS business interests does not serve any auction-related purpose and is overly burdensome.

Antigone also agrees with the Commission that there is no need to require audited financial statements from applicants that do not otherwise have their financial statements audited. By eliminating this requirement, the Commission will greatly reduce both the administrative and financial burden on small businesses. Requiring a certification from the applicant's chief financial officer will provide the Commission with adequate assurance of the applicants financial qualifications.

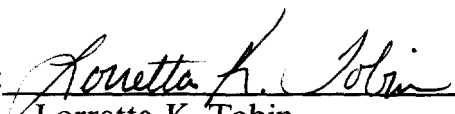
Finally, Antigone supports the Commission's continuing efforts to collect information on minority and women participation in the communications industry. However, the Commission should not allow these efforts to prevent it from adopting gender-based provisions for the PCS D, E and F blocks. As previously discussed, an intermediate scrutiny standard of review still applies to gender-based programs. An important governmental objective has been mandated by Congress and the gender-based

provisions proposed by the Commission are substantially related to the achievement of that objective. The present record in support of the Commission's gender-based D, E and F block provisions is sufficient to satisfy intermediate scrutiny.

Respectfully submitted,

ANTIGONE COMMUNICATIONS
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